



STATE OF INDIANA

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December 29, 2015

Mr. Shaw Friedman
705 Lincolnway
La Porte, Indiana 46350

Re: Formal Complaint 15-FC-302; Alleged Violation of the Access to Public Records Act by the State of Indiana, Indiana Finance Authority

Dear Mr. Friedman:

This advisory opinion is in response to your formal complaint alleging the State of Indiana, Indiana Finance Authority ("IFA") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Office responded via Counsel, Andrew Seiwert, Esq. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on November 10, 2015.

BACKGROUND

Your complaint dated November 9, 2015 alleges the State of Indiana, Indiana Finance Authority violated the Access to Public Records Act by improperly denying your records request.

On or prior to September 17, 2015 you requested a copy of the study or evaluation performed by IFA by the advisory firm KMPG regarding the Indiana Toll Road lease. You also requested minutes from the Toll Road Oversight Board.

On October 14, 2015 the minutes were produced but your request for the study was denied. The IFA stated the records are exempt under Ind. Code § 5-14-3-4(b)(6), the deliberative materials exemption. You contend the IFA is improperly using this exemption because KMPG used factual data such as revenue statements and projected pro forma.

On November 30, 2015 IFA responded. IFA states the deliberative materials exemption is appropriate regardless of the materials used. IFA contends the projected pro forma are routinely used to formulate business plans or financing proposals. Therefore, IFA contends the use of pro forma should not be a barrier to raising the exemption.



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ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” See Ind. Code § 5-14-3-1. The State of Indiana, Indiana Finance Authority is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy IFA’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

The State of Indiana commissioned KMPG to develop a feasibility study analyzing debt capacity and projected cash flows. You requested this study in your public records request. IFA refused to provide the requested record under the deliberative materials exemption. Ind. Code 5-14-3-4(b)(6) reads:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Both parties have, in good faith, invited this Office to review the report *in camera* seeking my opinion on the propriety of the exemption to disclosure claimed by IFA. IFA presented this document to me upon agreement of the parties. The document itself is brief in length (approximately nine (9) pages) and is comprised entirely of forecast predictions and not factual data as you suggest, despite it being based upon historical data plugged into a financial model. It is my opinion IFA did not err in considering this material to be deliberative. The document is marked as a conceptual data capacity analysis and conceptual implies an expression of opinion.

The deliberative materials exemption exists to foster frank discussion precedential to the decision-making process. This includes discussions between a contractor and a public agency. Disclosure of such information can sometimes – although not always – hinder such free expression of opinion. In fact, although not raised by the IFA, financial forecasts have also been suggested to be trade secrets by various authorities. See generally, *In re Wabash Valley Power Ass’n, Inc.*, 2003 WL 23498491 (Ind. U.R.C.).

When used in finance, a pro forma income statement is inherently speculative as it relies upon assumptions and financial modeling as a way to forecast revenue and losses. Actual data is used in a



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formula; however that formula and resulting data are the speculative intellectual property considered to be deliberative.

Your point is well taken that a public agency cannot throw a "blanket exemption" over a public record to shield it from disclosure. However, in this case, it appears as if the document in question is entirely based upon projection and speculation and is therefore properly considered deliberative.

CONCLUSION

Based on the foregoing, it is the determination of the Indiana Public Access Counselor that the State of Indiana, Indiana Finance Authority has not violated the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read "LHB", is written over a horizontal line.

Luke H. Britt
Public Access Counselor

Cc: Mr. Andrew Seiwert, Esq.